Supreme Court, U. S.
FILED
JUL 29 1980
MICHAEL RODAK, JR., CLE

No. 80-136

IN THE

Supreme Court of the United States

October Term, 1980

WANDA P. CHOCALLO, Administrative Law Judge,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HON. WANDA P. CHOCALLO,
Pro Se
308 Maple Avenue,
Drexel Hill, Pa. 19026
(215) 259-1628

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

Petition for Writ of Certiorari

(No. 80-136, Oct. Term, 1980
Chocallo, ALJ v. U.S.A.)

ERRATA

The following were inadvertently omitted from page 3, STATEMENT OF THE CASE:

Insert on line 16 after "Trachtenberg"

"dated September 18, 1978"

Insert on last line after "order."

"On Dec. 11, 1978, another Appeal Council order was issued purporting to dismiss the request for hearing because it was advised that the appropriate component of the SSA was prepared to issue a favorable determination of Macklin's claims. The order directed ALJ Chocallo forward forthwith the claim files to Rose Lepore, Regional Commissioner, Region III, SSA, Phila., Pa."

QUESTIONS PRESENTED

1. Whether the court lacked jurisdiction to act.
2. Whether the averments of Respondent's, United States of America, Complaint state a valid cause of action.
3. Whether ALJ Chocallo's right and duty to hear and decide the *Macklin* case had been unlawfully infringed.
4. Whether departmental regulations (HEW) authorizing Appeals Council to hear and decide social security cases are illegal and unconstitutional.
5. Whether Appeals Council Orders of September 18 and December 11, 1978 were illegal and unconstitutional.
6. Whether the injunction order issued by the court was fatally defective and unenforceable by a contempt proceeding.
7. Whether the United States of America, respondent, failed to establish the right to have remedial punishment imposed on respondent.
8. Whether the contempt proceedings, contempt order and supplementation of the contempt order are invalid, in excess of the court's jurisdiction, an abuse of discretion and contrary to petitioner's constitutional rights.
9. Whether the Court erred in denying ALJ Chocallo's Motion to Consolidate this action with her action against the Bureau et al. and Community Legal Services Inc. et al. filed July 1, 1977 (CA—No. 77-2310, DC Eastern District of Pennsylvania).
10. Whether the court erred in denying petitioner's Motion to Dismiss Respondent's Complaint for Mandamus Relief.

TABLE OF CONTENTS.

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CITATION OF CONSTITUTIONAL PROVISIONS, STATUTES, ETC	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
Introduction	11
I. The APA and SSA Vested a Right and Duty in ALJ Chocallo to Hold Hearings, Interpret and Apply the Laws, and to Issue a Decision in *Macklin*'s Case, Free From Interruption and Intimidation	12
II. The Court Lacked Jurisdiction to Grant the Relief Requested	18
III. The Civil Contempt Order Issued by the Court Is Contrary to Law	21
CONCLUSION	24
APPENDIX:	
Judgment Order, U. S. Court of Appeals, 3rd Circuit, May 19, 1980	A1
Judgment Order, U. S. Court of Appeals, 3rd Circuit, April 30, 1980	A3
Order and Opinion, U. S. Dist. Ct., Eastern District of Pa., Dated July 27, 1979	A5
Order and Opinion, U. S. Dist. Ct., Eastern District of Pa., Dated October 26, 1979 (Filed October 31, 1979)	A10
Constitutional Provisions, Statutes, Regulations, etc.	A14

TABLE OF AUTHORITIES.

Cases: Page

A. C. Samford, Inc. v. United States, 226 F. Supp. 72 20
Association of Data Processing Service Organization, Inc. v. Camp, 397 U. S. 150 18
Butz v. Economou, 43 U. S. 478 (1978) 15
Califano v. Sanders, — US—; 45 USLW 4209 (1977) 16, 17
Ex parte Secombe, 60 U. S. 9 14
Hunt v. Commodity Future Trading Commission, 591 F. 2d 1234 17
International Long. Assn. v. Phila. Mar. T. A. et al., 389 U. S. 64, 88 S. Ct. 201 21
Nash v. Califano et al. (USCA, 2d Cir.) (1-7-80) 13, 16
Panama Refining Co. v. Ryan, 293 U. S. 388 18
Porter, Inc. v. Nat. Friction Products, 568 F. 2d 24 (1977) 21
Rizzo v. Goode, 423 U. S. 362, 96 S. Ct. 598 19
Rondeau v. Mosinee Paper Corp., 722 U. S. 49, 95 S. Ct. 2069 19
Schmidt v. Lessard, 414 U. S. 473 (1974) 21
Terminal Assn. of St. Louis v. U. S., 266 U. S. 17, 45 S. Ct. 5 22
Warth v. Seldin, 422 U. S. 490 (1975) 18
Weinberger v. Salfi, 422 U. S. 749 17
Wilkins v. Rogers, 581 F. 2d 399 17
Wong Yang Sung v. McGrath, 339 U. S. 33 16

Statutes and Rules:

Title 5, U. S. C. Section 556(c)(5), (7), (8) 2, 13
Title 5 U. S. C. Sections 701-706 17
Title 28 U. S. C. Section 1254 2
Title 28 U. S. C. §§ 1331, 1345 and 1361 .....6, 17, 21
Title 42 U. S. C. Section 405(g), (h) 2, 13, 16
20 Code of Federal Regulations 404.935 ..... 2, 3
20 Code of Federal Regulations 404.941 .....2, 7, 13, 17
20 Code of Federal Regulations 404.947a 2
20 Code of Federal Regulations 416.1449 ..... 2, 3

TABLE OF AUTHORITIES (Continued).

Statutes and Rules (Continued): Page

20 Code of Federal Regulations 416.1459 ..... 2, 7, 17
Federal Rules of Civil Procedure, Rule 4(b) and 4(d) 20
Federal Rules of Civil Procedure, Rule 12(a) 20
Federal Rules of Civil Procedure, Rule 65(d) 21

Miscellaneous:

42 Am. Jur. 2d, § 29, p. 764 19
43A Corpus Juris. Sec. 306, p. 676 23
2 Moore Fed. Practice § 4.29, p. 1203 20

OPINIONS BELOW

The Judgment Orders of the United States Court of Appeals for the Third Circuit in case Nos. 79-2003 and 79-2619 (D. C. Civil No. 79-0833) are unreported and are set out in the Appendix, *infra,* at pp. A1-A4. These cases, which are related and arise from the same cause of action, were consolidated by order of the Circuit Court dated March 6, 1980 on motion filed by the United States of America (respondent) for Leave to Consolidate Appeals for Disposition on the Merits." The Circuit Court, however, issued separate Judgment Orders, on different dates, which affirmed without opinion (per curiam) the judgments of the district court. The Circuit Court's Order issued in case No. 79-2003 was dated April 30, 1980; that issued in case No. 79-2619 was dated May 19, 1980. The Orders and Opinions of the United States District Court, Eastern District of Pennsylvania, are also unreported and are set forth in the Appendix, *infra* at pp. A5-A13.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit in Case No. 79-2003 (D. C. Civil No. 79-0833) was entered on April 30, 1980. The judgment of companion case No. 79-2619 (D. C. Civil No. 79-0833) was entered by the United States Court of Appeals for the Third Circuit on May 19, 1980. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1254.

CITATION OF CONSTITUTIONAL PROVISIONS, ETC.

The pertinent text of the constitutional provisions, statutes, regulations, etc. involved are set forth in the Appendix, *infra*, at pp. A14-A31.

The citations are as follows:

Title 5 United States Code 556, 557

20 CFR:

404.918(b), 404.934, 404.935, 404.940, 404.941, 404.945, 404.947, 416.1449, 416.1459.

Section 205(g) Social Security Act, 42 USC 405(g)

Section 205(h) Social Security Act, 42 USC 405(h)

Federal Rules of Civil Procedure, Rules 4(b); 4(d) and 65(d), 28 U. S. C.

STATEMENT OF THE CASE

Three extraordinary writs were summarily granted by the district court, i.e., mandamus, injunction and summary judgment, without hearing, answer and service and without the Government's meeting the standards and criteria imposed by law and established by judicial precedent. A writ of attachment for civil contempt also was issued under circumstances repugnant to traditional American concepts of justice.

During the course of proceedings before petitioner, Wanda P. Chocallo, a Social Security Administration (SSA), Bureau of Hearings and Appeals (BHA) presiding Administrative Law Judge (ALJ) in the William L. Macklin, Sr. case, Macklin's Community Legal Services attorney (CLS), Andrea Illig, succeeded in obtaining an Appeals Council Order from the Bureau Director—Chairman of Appeals Council, Robert L. Trachtenberg, which purported to remove the case to Appeals Council for hearing and disposition under departmental regulations 20 CFR 404.935 and 416.1449. Trachtenberg issued the order though he was fully aware that he, as well as other Appeals Council members were precluded from holding social security hearings and issuing decisions under the Administrative Procedure Act since they were not appointed pursuant to its terms. Petitioner knew that the order was issued without any intention on the part of Trachtenberg to have the matter "heard" by Appeals Council as required by the applicable regulations. In the past he issued similar orders during the course of proceedings before petitioner, for the sole purpose of having the cases reassigned to another more "acceptable" ALJ in order to control the outcome of the case. The order in question also purported, without warrant in law, to direct petitioner to surrender to Appeals Council on a date specified, which preceded the date on which she received a copy of the order.

Mr. Trachtenberg first introduced this device of removal and reassignment of cases to circumvent the provisions of the APA in the *Pearl Taylor* case, referred to *infra*.

As a result of ex parte contacts made by Macklin's CLS attorney with agency and other public officials (and those made by her client), the Administration, dehors the record and with no evidence before it, agreed to pay social security benefits to Macklin although his claims had been twice denied and he filed an untimely (4 months late) request for hearing from the reconsideration denial. The next step required was to terminate proceedings before petitioner. Ms. Illig was told by agency officials she and Macklin need not appear at the hearings scheduled by petitioner. She made this admission on the record at a hearing held on July 10, 1978. Because of the appearance of impropriety (and the actual fact of impropriety as a result of pressures exerted against petitioner by various public and agency officials [1]), Ms. Illig was advised the matter would have to be disposed of on the basis of a full and complete record developed in the "open courtroom." This she did not want. Nor did the agency officials want a ruling on the record by petitioner.

Through an arrangement between CLS and the Bureau, attorneys who wished to have their cases removed from ALJ Chocallo and reassigned to another judge, simply contacted "Don Przybylinski of Appeals Council" who would have an appropriate Appeals Council Order

1. Mr. O'Leary, Asst. Manager, Dover Delaware District Office; Clarence Petersen, Bureau Disability Insurance, Regional Office, SSA, Philadelphia; Gary Patterson, Senator William Roth's Office, Dover, Delaware; Herman Snyder, Chief Deputy to Regional Chief ALJ Sol Gitman. Written memoranda of such ex parte communications were prepared by petitioner's staff members and admitted by her into evidence as Exhibit 40 of *Macklin*'s case.

issued. This scheme was disclosed under oath by one of CLS's staff members, Miguel Bentacourt, and is discussed in Exhibit "A" attached to the United States of America (respondent) "Supplemental Material in Support of Plaintiff's Opposition to Defendant's Request for an Enlargement of Time Within Which to Respond to Complaint." This is the procedure Ms. Illig followed. However, her request also was made in writing and contained her admission that she knew Appeals Council was without lawful authority to review ALJ Chocallo's actions prior to the issuance of a final decision after close of hearings. Nonetheless, she requested this be done, or in the alternative that Appeals Council remove "the request for hearing" to itself.

In a lengthy letter to the Bureau dated November 24, 1978 (Exhibit "K" of Respondent's Complaint for Mandamus Relief), petitioner advised that she believed the order issued by the Director was not only fatally defective but a subterfuge employed by him to evade the law, as substantiated by fact and law. Further, that because a judge's obligation is to his faithful, fearless and independent interpretation of the law and Constitution and to safeguard private and public rights and interests, without fear of reprisal or blandishment of reward, she was obliged to conclude that the regulations cited in the Director's order, in addition to being null and void on their face, were invoked with fraudulent intent. A fortiori, she was precluded by her judicial oath and the Code of Ethics for Government Service from giving the order legal efficacy. She further pointed out that at the ex parte request of claimants CLS representatives, the Director issued similar orders in other cases while proceedings were pending before her; viz., Carmelita Verden, Dominic Valentime, Stella Barauskas, Albert Blackwell, Francisco and Iraida Ocasio, Margaret Leech. An examination of the records

revealed these cases were not heard by Appeals Council as required by the regulations but were sent back to the Philadelphia Hearing Office, often falsely marked "Remanded", for reassignment to another more acceptable ALJ.

On March 1, the United States of America, asserting as the basis for the court's jurisdiction Title 28, United States Code, §§ 1331, 1345 and 1361, instituted this action for an injunction directing petitioner to immediately deliver the *Macklin* case files in accordance with Appeals Council Orders of September 18 and December 11, 1979, the latter of which had never been served on petitioner and of which she had no prior knowledge. Although the Complaint did not allege immediate or imminent irreparable harm, or any injury in fact; failed to allege any express statutory right to the files; failed to allege any clear mandatory duty on the part of petitioner to honor and validate Appeals Council's order and, without service, answer and hearing, the district court summarily granted the injunction requested, which was affirmed, per curiam, by the circuit court.

ALJ Chocallo's request that she be furnished counsel at government expense was denied. She defended herself on her own time and entirely with her own resources. She moved to dismiss the complaint challenging, inter alia, the court's lack of in personam and subject matter jurisdiction; the validity of the service of process and summons issued; the validity of the cause of action; respondent's legal standing and capacity to maintain the action; the validity and constitutionality of appeals council orders; the validity and constitutionality of the regulations authorizing Appeals Council, whose members are not appointed under the APA, to hear and decide Social Security cases; and that the action was barred by the doctrine of judicial and sovereign immunity.

ALJ Chocallo also moved to have the government's case consolidated with a suit filed by her on July 1, 1977 (CA No. 77-2310, DC, EDPa.) against *BHA, Trachtenberg et al.* and *Community Legal Services, Inc. (CLS) et al.*, which though reassigned to 3 judges in succession is still pending. In her complaint she alleged, inter alia: (1) BHA Director, Robert Trachtenberg, in complicity with CLS lawyer Jonathein Stein (who had been repudiated and discharged by Pearl Taylor) issued an unlawful order dated June 10, 1977 which purported to do the following: (a) vacate ALJ Chocallo's interlocutory order excluding Stein from further participation in the *Pearl Taylor* case because of his unethical conduct and obstructive behavior; (b) remove the *Taylor* case to Appeals Council for hearing pursuant to 20 CFR 404.941 and 416.1459; and (c) remand the case to Acting Regional Chief ALJ Sol Gitman with directions that he reassign the case to another judge. (2) Mrs. Taylor testified before petitioner on June 13, 1977 that her CLS lawyer, Bartholomew Poindexter, who replaced Stein, phoned her Sunday, June 12, 1977, to inform her (during a three way conversation participated in by Stein,) that her case was being taken away from ALJ Chocallo and they were awaiting another judge to be assigned to the case; that she should not appear at the hearing scheduled for the following day. She told them she did not ask for another judge; did not want another judge and intended to appear and present her case to ALJ Chocallo on June 13th. They said she had to choose sides; that if she did not join them in the battle against ALJ Chocallo, she would go down in defeat. They openly admitted there was a conspiracy to have petitioner removed from office; that appeals council order was "a means to an end." (3) ARCALJ Gitman met with Mrs. Taylor and Stein immediately before the February 13, 1977 hearing. Gitman told Taylor ALJ Chocallo de-

nied 15 cases similar to hers (a bold lie); that if, in effect, she helped provide evidence for ALJ Chocallo's removal, she would receive disability benefits even though denied by ALJ Chocallo. (4) The Bureau and CLS, unlawfully and covertly, solicited attorneys, etc. to file complaints against ALJ Chocallo as an aftermath of the John C. Coleman case, over which she presided. Coleman's CLS attorney engaged in ex parte contacts with agency officials for the purpose of pressuring her. ALJ Chocallo discovered Coleman and his attorney concealed the fact that substantial fraud had been committed by him. ALJ Chocallo would not yield to such pressures, despite the agency's threat that she would be "investigated and fired". She requested the Secretary of HEW and the Civil Service Commission to investigate these and other unlawful activities. Bureau Director Trachtenberg countered by advising petitioner he planned to recommend she be removed from office. Thus, the secret smear campaign was undertaken. (5) At Trachtenberg's direction, petitioner's locked office was unlawfully broken into, entered, searched and seizure made of some of her papers. The purpose of the break-in was to remove the Taylor tapes and case files, which were not there. In her Complaint, petitioner requested, inter alia, Bureau defendants be enjoined from practices contrary to the APA that infringed on the impartiality and independence of ALJS; further, that they and CLS be enjoined from interfering, hindering and impeding her in the discharge of her judicial functions.

As a result of her suit, Trachtenberg, in retaliation, filed a letter of charges with the Civil Service Commission requesting ALJ Chocallo be removed from office for (1) failing to comply with Appeals Council's Order in the *Pearl Taylor* case and (2) for refusing to surrender the Taylor file. An appeal is presently pending from the Com-

mission's adverse decision. She was also sued by the United States of America in a mandamus action for return of the Taylor files. That suit was dismissed and summary judgment entered for ALJ Chocallo. With this background in mind, the events in the *Macklin* case may be better understood.

On July 27, 1979, the district court entered summary judgment for respondent. ALJ Chocallo had no prior knowledge that the Government moved for summary Judgment. No notice had been served on her. Nor had the court ordered the matter for argument or hearing, which, certainly, would have alerted petitioner and given her an opportunity to counter such motion. The court's injunctive order simply stated: "Defendant shall comply fully and completely with the Appeals Council Orders dated September 18, 1978 and December 11, 1978, within five (5) days after entry of this Order." A copy was received by ALJ Chocallo on July 31, 1979. In its opinion, the court stated petitioner's motion to dismiss was denied. It failed to address any of the issues raised by her.

On August 1, 1979, ALJ Chocallo filed an appeal to the Circuit Court. On September 17, 1979 at 3:15 P. M., she was served with respondent's Motion for the issuance of a contempt order signed by the court on September 4, 1979 and made returnable September 21, 1979. On September 21, 1979, ALJ Chocallo appeared and requested a two weeks continuance so that she could adequately prepare her defense. Only a week's continuance was granted although petitioner had her full time duties as an ALJ to discharge. On September 28, 1979, petitioner, who in the meantime had suffered a hypertensive crisis and was totally incapacitated, was represented by counsel. Counsel's application for a continuance on these grounds (as supported by medical certification) was denied on the ground, as stated by the court, "her physical presence in

court is not required in order to comply with the order of the Court even at the present time." (NT 14, 15) The court entered an order stating if the files were not turned over to the "Administration" by October 2, 1979, she would be fined $100 a day and if at the end of five days from October 2, 1979 the files had not been turned over to the Administrator in Philadelphia, she would be put in jail.

Motions to dismiss the contempt proceedings and for reconsideration and recission of the Order of September 28, 1979 were filed on behalf of ALJ Chocallo. The records of the *Macklin* case were attached with the latter motion and filed with the Clerk of the District Court with the request they be retained by the latter until ALJ Chocallo's appeal was adjudicated by the circuit court. On October 29, 1979, ALJ Chocallo filed an appeal from the contempt order of September 28, 1979. On October 31, 1979, after jurisdiction was in the court of appeals, the District Court entered an order directing the Clerk of the Court to, inter alia, deliver to the attorney for the government for delivery to the SSA, the entire Social Security claim file annexed to the Motion for Reconsideration, etc. At the same time it denied ALJ Chocallo's Motion.

The actions of the district court were affirmed, without opinion, by the circuit court.

REASONS FOR GRANTING THE WRIT

Introduction

A reign of terror and absolutism prevails within SSA, BHA (now OHA). Administrative Law Judges are not free. The independence mandated by Congress is a mere statutory myth. Every phase of their "judgmental" activities is constantly being encroached upon and controlled. Abuses and assaults against the independence and integrity of the administrative judicial process are the rule and not the exception. Administrators, in their zeal to control the American pocketbook (the agency dispenses billions of dollars) twist, torture and misapply the best of laws. An ALJ with an inflexible rule not to betray the integrity of his/her mind soon becomes a target of unlimited harassment, reprisals and a vicious smear campaign. An ALJ who refuses to submit to agency pressures and the dictates of such "public interest groups" as Community Legal Services will soon become a victim of a conspiratorial removal drive.

Petitioner risked her job and possibly her reputation because she refused to acquiesce in what she knew was wrong and would not go along, as expected, with practices that violated her judicial and personal code of conduct. There is greater honor and honesty in being a free mendicant rather than an enslaved and servile judge. Subservient judges contaminate impartiality and mean an enslaved people.

Great emphasis has been placed by this Court on the importance of preserving the independent judgments of ALJs in all stages of the proceedings before them to insure fair and impartial hearings. Chief Justice Warren Burger stressed the need for independent judges in an interview by U. S. News World Report, Inc. on December 19, 1977

with respect to a bill proposed by Senator Sam Nunn for a commission to review charges of misbehavior by a judge. The Chief Justice commented that it must be used with great caution and alertness "never to impinge on the decisional independence of federal judges." He declared that to subject federal judges to the suggested reconfirmation proceedings at certain intervals "would strike at the heart of the independence of the judges."

Justice Brandeis cautioned: "One naturally should be alert and vigilant to repel invasions of his independence by evil rulers; that the greatest danger to independence and freedom lurks in insidious encroachments by men of zeal, however well intentioned, but without understanding." Our forefathers, by adding commandments to the Constitution, knew that governments are administered by average men and that the mating of mediocrity with public office has never yet begotten genius, but has often begotten delusions of personal grandeur and an ambition to administer civilization.

The mandates of this Court on the subject are clear. However, the district court so far departed from such mandates and from the accepted and usual course of judicial proceedings, which departures were sanctioned by the Circuit Court, as to call for an exercise of this Court's power of supervision.

I.

The APA and SSA Vested a Right and Duty in ALJ Chocallo to Hold Hearings, Interpret and Apply the Laws, and to Issue a Decision in Macklin's Case, Free From Interruption and Intimidation

The APA, SSA and Department of HEW's implementing regulations placed in ALJ Chocallo, once the *Macklin* case properly came before her, responsibility for regula-

tion of the course of the hearing, disposition of procedural requests or similar matters and the production of an initial decision. 5 USC 556(c)(5)(7),(8), 42 USC 205(b) (h), 20 CFR 404.918(b), 404.941 et seq. Her jurisdiction and control over these matters terminates only upon the filing of an appeal from her decision. As a social security ALJ she had a dual responsibility. It was her duty to safeguard the rights and interests of Macklin and the public as well.

It also was her duty to assure the correct administration of the SSA, the APA and all other applicable statutes and legal regulations, to resolve issues, and to protect public and private rights by assuring that benefits will not be improperly paid but will be granted only to those entitled under the law on the basis of substantial credible evidence of record. The public's legitimate interests precluded her from giving validity to an order that clearly violated statutory and constitutional inhibitions, public and private rights and was calculated to disturb the course of impartial justice. The decision that Appeals Council's order was illegal and could not be validated by her, constituted an exercise of her APA adjudicatory responsibilities and was not a purely ministerial act, as characterized by the district court in its opinion.

Mr. Trachtenberg *ipse dixit* was fully cognizant of the limitations imposed by the APA upon his and Appeals Council's powers, and of the illegal nature of the regulations fraudulently invoked. In the case of *Nash v. Califano et al.*, (USCA, 2d. Cir., 1-7-80) — F.2d. —, where Nash contested the Secretary's delegation of the power to hold hearings to non-ALJ Appeals Council members, the court in its opinion stated: "*But Director Trachtenberg avers that no member of the Appeals Council has ever tried a case in that capacity.*"

It is eminently clear that Trachtenberg sought to circumvent and nullify the commands of the APA by issuing

the orders in question. To give his ultra vires orders vitality would set at naught principles deeply rooted in law on which rests the integrity of our judicial system.

Congress in enacting the APA, and this Court in its decisions, have condemned the practices employed by the Bureau Director, Community Legal Services and other agency and public officials who improperly injected themselves in the *Macklin* case. The essential right of judges to be free from intimidation and to conduct their business in an untrammelled and uninterrupted way lies at the foundation of our system of government. It is also a general principle of the highest importance to the proper administration of justice that a judicial officer in exercising the authority vested in him shall be free to act upon *his own convictions* without fear of personal hazard for there are procedures available to determine whether claimants receive a fair hearing.

Certainly, what occurred here does not contribute to principled and fearless decision-making. It seriously disrupts, hinders and obstructs the orderly and impartial administration of justice and abrogates the rights and dignity of the judge which must be as scrupulously guarded as those of litigants and lawyers. *Ex parte Secombe,* 60 US 9.

Judges must not be obsequious toadies in their attitudes towards high ranking officials and their obligation to safeguard public and private rights with equal protection under the laws does not permit a timorous reluctance to take whatever action is warranted by the circumstances of the case. The people must depend upon courageous, independent judges for decisions and judicial conduct that will ensure society as a whole and its individuals against those who would undermine and destroy the orderly and impartial course of justice. The administration of justice should not be made unduly difficult by irresponsible acts of public officials, litigants and lawyers as outlined above.

This court, in its opinion in *Butz v. Economou,* 438 U. S. 478 (1978), wisely stated:

> "In light of these safeguards, we think the risk of an unconstitutional act by one presiding at an agency hearing *is clearly outweighed by the importance of preserving the independent judgment of these men and women* . . . Those who complain of error in such proceedings must seek agency or judicial review." (Italics supplied)

The decision of the district court, affirmed by the Circuit Court, provides the vehicle whereby agencies may avoid entirely the provisions of the APA and nullify the commandments of Congress. It obviously has already provided the vehicle for the Social Security Administration to conduct hearings behind the scenes and pay out claims without any evidence "on the record". This is boldly admitted by the request in its Complaint that the Court sanctify its actions by ordering petitioner to "furnish the evidence" so that the payments may be "justified." This court condemned such practices and as supervisors of the federal system, it is the duty of the courts to see that the law is enforced not selectively but in all cases coming before them. Concern over administrative impartiality and the fact that such power ofttimes was put to arbitrary and biased use, led to the enactment of the APA. Unfortunately, the evils it sought to remedy are blatantly perpetuated within the Social Security Administration and condoned by the courts in this case. It is well established that neither the courts nor administrative bodies are free to disregard Congressional policy concerning the manner in which administrative hearings are to be conducted merely because the administrative record may disclose a meritorious case. It is their duty to look beyond the merits of the individual case towards the effectuation of

a broad policy of insuring fair and impartial hearings to all. Any other approach would result in chaos and uncertainty. *Wong Yang Sung. v. McGrath,* 339 U. S. 33. Courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the Congressional policy underlying a statute.

What was said by the court in the *Nash* case, *supra,* is most significant:

> "The Social Security Administration has, moreover, recognized the limitations upon its power over the ALJ's decisionmaking process. The position description for ALJs issued by the Administration's Bureau of Hearings and Appeals states that ALJs possess 'full and complete individual independence of action and decision . . . without review [and] full responsibility and authority' for the conduct of hearings and the disposition of cases. 'The social Security and Administrative Procedure Acts,' the description continues, 'prohibit substantive review and supervision of the [ALJ] in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication, and after publication only by the Appeals Council in certain prescribed circumstances. He is subject only to such administrative supervision as may be required in the course of general office management.

The exclusive remedy for review of the decision issued after hearing is limited by the restrictive language of § 205(h) 42 USC 405(h) of the Social Security Act, which routes review of social security cases such as this through § 205(g) of the Act, 42 USC 405 which has been held by the rulings of this Court in *Califano v. Sanders,*

— US — 45 U. S. L. W. 4209 (1977) and *Weinberger v. Salfi*, 422 U. S. 749, to preclude review by Appeals Council and by the court under 28 USC 1331, the Administrative Procedure Act, 5 USC 701-706 or any other act.

Since, in the words of Mr. Justice Stewart in *Califano v. Sanders, supra,* "the second sentence should be read to mean exactly what it says, "a fortiori the regulations authorizing Appeals Council to review the decisions of ALJs (who are directly delegated by him to conduct hearings and issue final decisions) are illegal and null and void. It must be remembered that Appeals Council is not a creature of statute or Congressional mandate. Its genesis was conceived by reference to it in departmental regulations cited above.

Irrespective of the dubious legitimacy of Appeals Council, injunctive relief will not be granted against a judge where the record demonstrates plaintiff was simply dissatisfied with a judge's rulings. *Wilkins v. Rogers,* 581 F. 2d 399.

Nor will the courts provide statutory or injunctive relief interrupting administrative proceedings absent special circumstances. *Hunt v. Commodity Future's Trading Commission,* 591 F. 2d 1234. To hold otherwise, would render the orderly administrative procedure impossible as demonstrated in this case.

There can be no doubt that 20 CFR 404.941 and 20 CFR 416.1459 delegating authority to conduct SSA hearings to Appeals Council members, who are appointed by the Bureau Director and are not protected by the safeguards provided in the Administrative Procedure Act, contravene the prohibitions in the APA. A fortiori, they are illegal and unenforceable.

From the beginning of Government, Congress has conferred upon executive officers the power to make regulations—"not for the Government of their department but

for administering the laws which did govern." Such regulations only become binding rules of conduct if they are valid; and they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined. *Panama Refining Co. v. Ryan,* 293 U. S. 388.

II.

The Court Lacked Jurisdiction to Grant the Relief Requested

Article III of the Constitution limits federal judicial power to the adjudication of "cases or controversies." Thus, a threshold question in every suit is whether plaintiff has alleged that it has in fact suffered (or is imminently subject to suffering) a cognizable injury. *Warth v. Seldin,* 422 U. S. 490 (1975). Jurisdiction must be ascertained from a reading of the Complaint. The merits are not to be considered. *Association of Data Processing Service Organization, Inc. v. Camp,* 397 U. S. 150 at 153.

No substantial, real and irreparable injury is averred in respondent's Complaint. In paragraph 20, respondent alleged that Macklin "will soon be receiving, or has already begun to receive, monthly DIB benefits. Payments to Mr. Macklin are being made on an emergency basis, *but will not become part of the regular payment system until the medical evidence supporting the determination that Mr. Macklin is disabled, which is contained in the file being held by the defendant,* is forwarded to ODO. Issuing payments on an emergency basis rather than through the regular payment system strains the limited manpower resources of the ODO, Social Security Administration, causes administrative inconvenience, and may result in the interruption of payments to the claimant. ODO must review the documents contained in the file

being held by the defendant in order to avoid the overpayment or underpayment of benefits to claimant Macklin."

The basis of injunctive relief in federal courts has always been (1) irreparable harm and (2) inadequacy of legal remedies. *Rondeau v. Mosinee Paper Corp.*, 95 S. Ct. 2069, 722 US 49; *Rizzo v. Goode*, 96 S. Ct. 598, 423 US 362. The injury must be material and consequential, existing or presently threatened, and not one that is technical, theoretical, doubtful, eventual or contingent to warrant judicial intervention.

It has also been declared that the basis for injunctive relief must be interference with a legal right of the plaintiff not of a third party, for the complainant cannot succeed because someone else may be hurt. 42 Am. Jur. 2d § 29, p. 764 et seq. The principal beneficiary of these extraordinary proceedings initiated by the Government at public expense is Macklin who, through the "undertow of extraneous influences" is the recipient of a special type of justice and bounty not available to others entitled to the equal protections of the law.

The public's legitimate interests and the integrity of the adjudicative process dictated that the parties should have pursued the ordinary processes of the law rather than chosen the extraordinary ones. Moreover, it was the duty of the court to enforce the law not selectively but uniformly. Extraordinary remedies are seldom granted and only when no other course of action is available and under very special circumstances.

The court also lacked requisite jurisdiction over ALJ Chocallo's person. Service of process was not made in accordance with the requirements of Rule 4(d), Federal Rules of Civil Procedure governing service upon officers of the United States. Personal service of the complaint on ALJ Chocallo was never made. It was served on "Cathy

Ingram" at the offices of BHA, 1528 Walnut Street, who was falsely certified by the Deputy Marshall in his affidavit of service, "to be a person of suitable age and discretion then residing in the defendant's usual place of abode." Ms. Ingram did not reside at ALJ Chocallo's usual place of abode and was not served there. Nor was she authorized to accept service in behalf of petitioner. Ms. Ingram worked as a hearing assistant for the Bureau.

In actions seeking mandamus or injunctive relief, personal service must be made upon the officer or agency pursuant to FRCP Rule 4(d) in view of the fact that a violation of a court order entered in such an action is punishable by contempt proceedings. Even in a declaratory action which seeks an in personam adjudication, as opposed to in rem relief, there should be personal service. Service on the United States attorney or one of the official's subordinates is not sufficient to obtain jurisdiction over the official, unless the subordinate upon whom personal service is made had been appointed by the official as his agent upon whom service could be made. *2 Moore Fed. Practice,* § 4.29, p. 1203.

In addition to the invalid service, the summons is fatally defective since it recites a date for filing an answer other than that prescribed by FRCP, Rule 12(a), as required by FRCP Rule 4(b). Rule 12(a) requires that an officer of the United States shall serve an answer to the complaint within 60 days after the service upon the United States Attorney of the pleading in which the claim is asserted. There is authority that a writ returnable at a time not authorized by law is void and, therefore, not amendable. *A. C. Samford, Inc. v. United States,* 226 F. Supp. 72.

III.

The Civil Contempt Order Issued by the Court Is Contrary to Law

Where the court, as here, merely incorporates by reference to the Complaint or other document the act sought to be directed or restrained, the order ignores the mandatory requirement of Rule 65(d), FRCP, 28 USC and thus the error in the order is serious and decisive and precluded plaintiff from successfully invoking the district court's contempt powers. *Schmidt v. Lessard*, 414 U. S. 473 (1974); *H. K. Porter Co., Inc. v. Nat. Friction Products*, 568 F. 2d 24 (1977), 7th Cr. Ct. App. See also *Internat'l Long. Assn. v. Phila. Mar. T. A. et al.*, 389 U. S. 64, 88 S. Ct .201.

It is beyond cavil the court's injunctive order failed to comply with Rule 65(d). It is also beyond cavil that the two Appeals Council orders in question are contradictory. The failure of the court below to spell out in its injunctive order the specific obligations resting upon ALJ Chocallo *ipso facto* is fatal to the contempt proceedings.

To sustain the conviction of a person for civil contempt, there must exist not only jurisdiction in the court to grant the order allegedly disobeyed but also a valid cause of action in the aggrieved party. There can be no doubt the court lacked requisite jurisdiction of ALJ Chocallo's person and was without jurisdiction to grant the relief requested.

The district court was without jurisdiction to act on the motion for reconsideration of its contempt judgment and to supplement or implement its judgment after ALJ Chocallo filed an appeal from the contempt order. Inasmuch as notice of appeal from the contempt judgment had been filed prior to the court's action on ALJ Chocallo's Motion was filed, jurisdiction was vested in the appellate

court and the district court was without jurisdiction to supplement its contempt judgment after the filing of the notice of appeal. Its action was ultra vires, exceeded the limitations upon its powers and is null and void.

The contempt order likewise was improperly entered because the Government failed to prove it had been injured, which is essential in a civil contempt proceeding. If a complainant has not been damaged by the violation of a decree or injunction, he is not entitled to have any remedial punishment imposed on the violator. There must be proof of clear injury to plaintiff. No such proof was required by the court or shown by respondent. Petitioner, a fortiori, could not be held in contempt for alleged noncompliance with the court's decree whether considered injunctive or mandamus in nature. *Terminal R. Assn. of St. Louis v. U. S.*, 45 S. Ct. 5, 266 U. S. 17.

The court committed a clear abuse of discretion by refusing to continue the hearing, though petitioner's illness disabled her for more than three weeks, for the simple reason that it felt her presence wasn't required for him to hold her in contempt. Had it not been for the imperiled state of her health, she most assuredly would have elected to appear and go to jail rather than betray her public trust and judicial obligations. Unfortunately, it would have been foolhardy to risk a heart attack or stroke.

The power to punish by contempt, vested in district courts by statute, is not an unbridled one and appellate courts have special responsibility for determining that the power is not abused. The courts have a special duty to exercise their extraordinary powers with utmost responsibility and circumspection. There can be no doubt that the power of contempt was not used by the court in the instant case with great caution and alert self-restraint. It was applied without clear and convincing proof established by the government. It was irresponsibly applied

without affording ALJ Chocallo the opportunity to defend and the benefit of every reasonable doubt to which she was entitled. It was applied in the absence of any proof of clear injury to respondent, which is essential in a civil contempt proceeding.

The following requirements likewise were not met, which nullifies the contempt judgment: (1) It must be sufficient on its face to show jurisdiction and justification for the punishment. (2) It should contain a statement of the facts constituting the contempt, mere conclusions are insufficient. It must be definite and certain as to the punishment imposed and if a fine is imposed, it should designate the person to whom it is to be paid. (3) It cannot, in absence of express statutory authorization, include as part thereof a modification or enlargement of the injunction order. (4) It must state that the alleged offense was calculated to, or actually did impair, impede, or prejudice the rights and remedies of plaintiff. 43A C. J. S. 306, p. 676 et seq. and cases cited therein.

The law governing extraordinary writs, as firmly established by this court, has been patently violated by the district court and given the imprimatur of the Circuit Court.

The painful aspect of the district court's decision, affirmed per curiam by the Circuit Court, is that its rationale is as impermissible as its consequences. There is simply no indication in the Complaint itself, or in the court's opinion, of the statutory basis for summarily conferring on the respondent the right to the Macklin files and the duty on petitioner to surrender them to those who are not a party to these proceedings and have no statutorily conferred right to such files; viz., Rose Lapore and the unidentified body called appeals council, although petitioner's jurisdiction over the *Macklin* case by Congressional edict does not terminate until she issued a decision in

the case. It is difficult to understand how the court arrived at its decision.

Of even greater concern is the total lack of regard by the district and circuit courts for the constitutional and statutory rights of ALJ Chocallo, who acted with utmost fidelity in discharging her public trust, and those of the public whose interests she had a positive duty to protect. What is also alarming is that the highly irregular practices and taint that stigmatize the integrity of the social security system and its administrative judicial process are given these courts' official imprimatur. It is dangerous precedent and a threat to every freedom if allowed to stand.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HON. WANDA P. CHOCALLO
Pro Se
308 Maple Ave.,
Drexel Hill, Pa. 19026

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2619

UNITED STATES OF AMERICA

v.

CHOCALLO, WANDA P.,
ADMINISTRATIVE LAW JUDGE

Wanda P. Chocallo, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. C. Civil No. 79-0833

Submitted April 25, 1980

Before: ALDISERT, ROSENN, and GARTH, *Circuit Judges*

Judgment Order

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ MAX ROSENN
Circuit Judge
Attest:

/s/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

DATED: May 19, 1980

Certified as a true copy and issued in lieu of a formal mandate on June 10, 1980.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2003

UNITED STATES OF AMERICA

v.

CHOCALLO, WANDA P.,
ADMINISTRATIVE LAW JUDGE

WANDA P. CHOCALLO,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 79-0833)

Submitted Under Third Circuit Rule 12(6)
April 25, 1980

Before: ALDISERT, ROSENN and GARTH, *Circuit Judges.*

Judgment Order

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable John P. Fullam, *United States v. Chocallo,* Civ. No. 79-0833 (E. D. Pa. July 27, 1979); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appeallant.

BY THE COURT,

/s/ ALDISERT
Circuit Judge

Attest:

/s/ THOMAS F. QUINN,
Thomas F. Quinn
Clerk

DATED: April 30, 1980

Certified as a true copy and issued in lieu of a formal mandate on May 22, 1980.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-833

UNITED STATES OF AMERICA

Plaintiff

v.

WANDA P. CHOCALLO,

Defendant

Order

AND NOW, this 27th day of July, 1979, upon consideration of the parties' Cross-Motions for Summary Judgment, it is hereby ORDERED that:

1. Summary Judgment is entered in favor of the Government and against the defendant.

2. Defendant shall comply fully and completely with the Appeals Council Orders dated September 18, 1978 and December 11, 1978, within five (5) days after entry of this Order.

/s/ JOHN P. FULLAM

J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-833

UNITED STATES OF AMERICA,

Plaintiff

v.

WANDA P. CHOCALLO,

Defendant

Memorandum and Order

FULLAM, *J.* JULY 26, 1979

The United States, on behalf of the Secretary of Health, Education and Welfare, brings the instant action for declaratory, mandamus and injunctive relief. Jurisdiction is based upon 28 U. S. C. §§ 1331, 1345 and 1361. Plaintiff has filed a Motion for Summary Judgment and defendant has filed a Motion to Dismiss and/or for Summary Judgment. These will be treated as Cross-Motions for Summary Judgment. There are no genuine issues of material fact. A summary of the undisputed facts follows.

On March 14, 1977, William L. Macklin, Sr. (claimant), pursuant to Social Security Administration procedures, filed a claim for disability insurance benefits and supplemental security income benefits. The initial application for benefits was denied and upon request for reconsideration the claim for benefits again was rejected.

On December 16, 1977, claimant filed with the office of Hearings and Appeals (OHA) a request for a hearing *de novo*. Defendant, an Administrative Law Judge employed by the OHA, randomly was assigned to be the presiding officer at the hearing. Pursuant to claimant's request, a hearing was scheduled initially for June 9, 1978, and, upon claimant's request for continuance, was rescheduled for July 10, 1978.

Some time after the claimant's request for reconsideration was denied, the Social Security Administration (SSA) Case Review Section (CRS) randomly selected for review claimant's application. CRS returned the application to the Disability Determination Service (DDS) of the State of Delaware, the office which denied benefits initially, with a recommendation that DDS reconsider the claim. DDS requested that claimant undergo further medical tests and, upon review of the results of those tests, reversed its initial decision and determined that claimant was eligible to receive benefits. This favorable determination was made before December 16, 1977, but, for some reason not stated in the record, claimant was not aware of the determination until late June or early July of 1978.

Upon learning of the favorable CRS determination, the claimant's attorney requested that the defendant dismiss the hearing request and cancel the hearing scheduled for July 10, 1978. The defendant refused to do so. In late August of 1978, the claimant's attorney petitioned the Appeals Council either to vacate defendant's denial of the request to dismiss the hearing request, or to remove the matter from the defendant's jurisdiction and assume jurisdiction itself.

On September 18, 1978, Robert L. Trachtenberg, chairman of the Appeals Council, issued an order removing the matter from defendant's jurisdiction pursuant to 20

C. F. R. §§ 404.941 [1] and 416.1459, and ordering defendant to forward Macklin's claims file to the Appeals Council no later than September 25, 1978. The defendant did not receive a copy of the September 18 Order until October 2, 1978, but, upon receipt, refused to heed it. After various superiors repeatedly urged that she comply with the Appeals Council Order, the defendant, by letter dated November 24, 1978, informed Chief Administrative Law Judge Philip T. Brown that she intended to disregard the Order. A second Order directing defendant to surrender Macklin's claims file was issued by the Appeals Council on December 11, 1978, and was mailed to defendant. Defendant has not responded to the December 11 Order, nor has she forwarded Macklin's claims file to the Appeals Council.

Because SSA does not have access to certain information contained in the claims file, a complete and final determination of the benefits due claimant Macklin has not been made. Macklin, however, is receiving benefits under the SSA emergency payment system entitled Immediate Payment Critical Case (IMPACC). Use of this system entails continuing administrative expense for SSA.

Upon review of the entire record, it is evident that the Appeals Council is empowered to divest the defendant of jurisdiction over the Macklin claim under 20 C. F. R. §§ 404.941 and 416.1459, and to determine the matter

1. § 404.941. Removal of Hearing to Appeals Council.

The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer. The hearing on any matter so removed to the Appeals Council shall be conducted in accordance with the requirements of §§ 404.924, to 404.938, inclusive. Notice of such removal shall be mailed to the parties at their last known address.

The provisions of § 416.1459 parallel directly the provisions of § 404.941.

itself. Defendant's compliance with the September 18 and December 11, 1978 Orders of the Appeals Council is mandatory. Compliance or non-compliance is not a matter left to the discretion of the defendant. The Orders require a Government officer to perform a legal duty of a ministerial character. The Government's Motion for Summary Judgment will be granted.

In support of her motion, defendant has advanced numerous arguments. Each of these has been considered and rejected by the Court. The defendant's motion will be denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-833

UNITED STATES OF AMERICA,

Plaintiff

v.

WANDA P. CHOCALLO,

Defendant

Order

(Filed October 31, 1979)

AND Now, this 26th day of October, 1979, it is ORDERED that the Clerk of this Court is directed to deliver to the attorney for the Government, for delivery to the Social Security Administration, the entire Social Security claim file which is annexed to the defendant's "Motion for Reconsideration and Rescission . . ." filed October 5, 1979. Counsel for the Government may obtain said file, upon request, at the Clerk's office, by furnishing to the Clerk a written receipt for the same; whereupon, counsel for the Government shall deliver the file to the Appeals Council in conformity with this Court's Order of July 27, 1979.

/s/ JOHN P. FULLAM

J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-833

UNITED STATES OF AMERICA,

Plaintiff

v.

WANDA P. CHOCALLO,

Defendant

Memorandum and Order

OCTOBER 26, 1979

FULLAM, *J.*

On July 27, 1979, this Court ordered the defendant, an Administrative Law Judge in the Social Security Administration, to comply with certain Orders previously issued by the Appeals Council directing her to surrender a certain case file to the Appeals Council. Defendant unsuccessfully sought a stay of that Order, both from this Court and from the Court of Appeals of the Third Circuit. Defendant failed to comply with this Court's Order of July 27, 1979, and was cited for contempt.

A hearing on the contempt citation was held on September 28, 1979. Defendant did not appear at the hearing, but was represented by retained counsel, who unsuccessfully sought a postponement. I ruled from the Bench that the defendant was indeed in contempt of this Court's Order of July 27, 1979, but that she could purge herself of contempt by delivering the case file in question to this Court not later than October 3, 1979.[1] It was also ordered

1. Counsel's request for a postponement was based upon his lack of familiarity with the case (having only recently been re-

that failure to deliver the file by the specified deadline would result in the imposition of cumulative fines at the rate of $100 per day until the file was delivered; and that if the fines did not produce compliance after five days, the defendant would be arrested and held in custody until the Order was complied with.

On October 5, 1979, the defendant filed a "Motion for Reconsideration and Rescission of the Court's Order of September 28, 1979 and for Deposit of Documents, the Subject of this Action, into the Registry of the Court." Attached to that Motion is the case-file which the defendant had been ordered to produce. The text of the Motion reflects that the defendant

> ". . . moves the Court to reconsider and rescind its order of September 28, 1979 and to receive into the registry of the court certain documents, which are the subject of this action, and for other interlocutory relief pending final disposition of this matter by the Circuit Court of Appeals for the Third Judicial Circuit of the United States."

---

1. (Cont'd.)

tained); the alleged illness of the defendant and difficulties in communicating with his client (counsel stated that his client refused to give him her home telephone number, he did not know where she was then staying, and it was unlikely that she could be reached at her office. It was represented that the sole communication between client and counsel would consist of telephone calls originated by the client). I ruled that the alleged illness would not prevent physical delivery of the file in question, but granted the delay until October 3 to enable counsel to communicate with his client and effect the necessary arrangements. The option of delivering the file to the Court (rather than to the Appeals Council directly) was designed to make it easier for counsel to aid his client in complying with the Court's Order, and also to neutralize some of the emotional pressures which, it was thought, might have been a factor in defendant's failure to comply with the Court's earlier Orders.

The Memorandum accompanying this Motion includes the following language:

> "Accordingly, the documents, which are the subject of this action, are attached hereto and are deposited into the registry of the court and the court is urged to retain custody thereof pending final disposition of the matter by the appellate court. . . ."

The Government interprets this language as a request that delivery of the case file to the Appeals Council should be withheld until all appeals which have been or may be filed by the defendant from this Court's Orders have been finally resolved by the appellate courts. The Government has therefore filed a "Motion for an Order Implementing This Court's July 27, 1979 Decree," in which the Court is requested to provide the Social Security Administration with either the original case file or a duplicate copy thereof.

The Government's Motion will be granted. Indeed, delivery of the file to the Government is a necessary step in carrying out this Court's mandate of July 27, 1979, which this Court's Order of September 28, 1979 was intended to enforce.

Defendant's request that this Court retain the file pending appeals is simply another request for a stay. The requested stay has previously been denied by this Court, and has repeatedly been denied by the Court of Appeals (by a panel on September 20, 1979, and by the Court en banc on October 1, 1979).

It should be noted that delivery of the file to the Social Security Administration at this time does not render the entire case moot. The defendant did not deliver the file within the time limits specified by the Court, and she is therefore still subject to the imposition of fines for civil contempt.

Constitutional Provisions, Statutes, Regulations, Etc.

---

5 U. S. C. 556 provides:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.
>
> (b) There shall preside at the taking of evidence—
>
> (1) the agency;
>
> (2) one or more members of the body which comprises the agency; or
>
> (3) one or more hearing examiners appointed under section 3105 of this title.
>
> This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a vio-

lation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U. S. C. 557 provides:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or,

in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to

be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may

designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

29 U. S. C. 1331 provides:

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U. S. C. 1345 provides:

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

28 U. S. C. 1361 provides:

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

20 C. F. R. 404.935 provides:

§ 404.935 Dismissal of request for hearing; by application of party

With the approval of the presiding officer at any time prior to the mailing of notice of the decision, a request for a hearing may be withdrawn or dismissed upon the application of the party or parties filing the request for such hearing. A party may request a dismissal by filing a written notice of such request with the presiding officer or orally stating such request at the hearing.

20 C. F. R. 404.941 provides:

§ 404.941 Removal of hearing to Appeals Council

The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer. The hearing on any matter so removed to the Appeals Council shall be conducted

in accordance with the requirements of §§ 404.924 to 404.938, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

20 C. F. R. 416.1449 provides:

§ 416.1449 Dismissal of request for hearing; by application of party

With the approval of the presiding officer at any time prior to the mailing of notice of the decision, a request for a hearing may be withdrawn or dismissed upon the application of the party or parties filing the request for such hearing. A party may request a dismissal by filing a written notice of such request with the presiding officer or orally stating such request at the hearing. Where a request for hearing is withdrawn or dismissed the findings in the initial or the reconsidered determination are final and binding (see § 416.1453).

20 C. F. R. 416.1459 provides:

§ 416.1459 Removal of hearing to Appeals Council

The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer. The hearing on any request so removed to the Appeals Council shall be conducted in accordance with the requirements of §§ 416.1433 to 416.1446, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

Federal Rules of Civil Procedure, Rule 4 in pertinent part provides:

(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with

such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2)..(3)..(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

Federal Rules of Civil Procedure, Rule 65(d) in pertinent part provides:

(D) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

20 CFR

20 CFR § 404.918b provides:

Prehearing case review.

(a) *General.* Under the circumstances set forth in this section, a case in which a request for hearing has been filed, may at any time prior to the hearing, be forwarded to the component of the Social Security Administration (including a State Agency) which issued the determination upon which the request for hearing was based for the purpose of determining whether such determination may be revised. The parties to the pre-hearing case review shall be the parties referred to in § 404.919.

(b) *Criteria for prehearing case review.* Prehearing case review shall be applicable where:

(1) Additional evidence is submitted in connection with the request for hearing or,

(2) There is an allegation or indication that additional evidence is available; or

(3) There are other indications that the prior determination may be revised, e.g., error noted in the file, a change in law or regulation.

(c) *Prehearing case review and determination.* The component of the Social Security Administration which issued the determination upon which the request for hearing was filed shall, upon receipt of the case, ascertain whether such determination may be revised. A revised determination may be either wholly or partially favorable to the claimant. Prehearing review shall not delay the scheduling of a hearing in the regular order unless the claimant consents to the continuation of such review. Where the prehearing review is not completed prior to the date on which the case is to be scheduled for hearing, the case shall be forwarded to the presiding officer for hearing, except where a favorable revised determination is in process or the parties, in writing, consent to the scheduling of the hearing being delayed until the completion of such review.

(d) *Notice of prehearing revised determination.* Where a revised determination is made as a result of the prehearing case review, notice of such revised determination, and the basis therefor shall be sent to the parties to such revised determination and the request for hearing at their last known addresses.

(1) *Revised determination wholly favorable.* Where the revised determination is wholly favorable to the claimant, the notice shall also inform the claimant that the presiding officer may dismiss the request for hearing unless the parties request in writing, within 30 days after the mailing date of notice of such revised determination, that the presiding officer proceed with the request for hearing.

(2) *Revised determination partially favorable.* Where the revised determination is partially favorable to the claimant, the notice of such revised determination shall also inform the claimant of the matter not found favorable to the claimant. The notice shall also inform the claimant that the presiding officer shall proceed with the hearing, unless the parties to such revised determination and the request for hearing affirmatively assent to the dismissal of the hearing request.

(3) *Right to hearing on prehearing revised determination.* The notice shall also advise the parties of their right to file, within 60 days after the notice of the prehearing revised determination, a request for hearing on such revised determination, as provided in § 404.961(b)." [4] FR 54755, Dec. 15, 1976]

20 Code of Federal Regulations § 404.940 provides:

Effect of presiding officer's decision.

The presiding officer's decision, provided for in § 404.939, shall be final and binding upon all parties to the hearing unless it is reviewed by the Appeals Council (see §§ 404.948-404.950) or unless it is revised in accordance with § 404.956, or unless the expedited appeals process is used, in accordance with § 404.916a. If a party's request for review of the presiding officer's decision is denied (see § 404.952), such decision shall be final and binding upon all parties to the hearing unless a civil action is filed in a district court of the United States, as is provided in section 205(g) of the Act, or unless the decision is revised in accordance with § 404.956.

20 CFR § 404.945 provides:

> Right to request review of presiding officer's decision or dismissal.
>
> If a presiding officer has made a decision, as provided in § 404.939, or dismissed a request for hearing, as provided in §§ 404.935 through 404.937, any party thereto may request the Appeals Council to review such decision or dismissal.

20 CFR § 404.947 provides:

> Action by Appeals Council on review.
>
> The Appeals Council may dismiss (see § 404.952) or, in its discretion, deny or grant a party's request for review of a presiding officer's decision, or may, on its own motion, within 60 days after the date of the notice of such decision, reopen such decision for review or for the purpose of dismissing the party's request for hearing for any reason for which it could have been dismissed by the presiding officer (see §§ 404.935 through 404.937). Notice of the action by the Appeals Council shall be mailed to the party at his last known address. [4] FR 54753, Dec. 15, 1976]

20 CFR § 404.947a provides:

> Basis for review of the presiding officer's decision or dismissal by Appeals Council.
>
> (a) The Appeals Council, on its own motion or on request for review, will review a hearing decision or dismissal where:
>
> (1) There appears to be an abuse of discretion by the presiding officer;
>
> (2) There is an error of law;
>
> (3) The presiding officer's action, findings, or conclusions are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue which may affect the general public interest.

(b) Where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the presiding officer's action, findings, or conclusion is contrary to the weight of the evidence currently of record. [4] FR 51588, Nov. 23, 1976]

20 CFR § 404.934(a) provides:

Fully favorable decision on the record.

Where evidence of record including evidence, if any, submitted with the request for hearing or received in prehearing preparation support a decision on the record which is fully favorable to the party or parties, the presiding officer, at his discretion, may issue a decision on such record without an oral hearing. The record for such decision shall be made as set forth in § 404.934(c). The notice of such decision issued on the record shall inform the party or parties of their right to an oral hearing, and the right to examine the evidence received in the record. [4] FR 51587. Nov. 23, 1976]

20 CFR § 404.934(b), (c) provide in pertinent part:

(b) Waiver of right to appear. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing filed with the presiding officer. Such waiver may be withdrawn by a party at any time prior to the mailing of notice of the decision in the case. Even though all of the parties have filed a waiver of the right to appear and present evidence and contentions at a hearing before the presiding officer, the presiding officer may, nevertheless, give notice of a time and

place and conduct a hearing as provided in §§ 404.923 to 404.932 inclusive, if he believes that the personal appearance and testimony of the party or parties would assist him to ascertain the facts in issue in the case.

(c) Record as basis for decision. Where all of the parties have waived their right to appear in person or through a representative and the presiding officer does not schedule an oral hearing, the presiding officer shall render a decision based on the record. * * * In any case where an oral hearing is not scheduled and the decision is to be based on the record, the presiding officer shall make a record of the relevant written evidence, including applications, written statements, certificates, affidavits, reports, and other documents which were considered in connection with the initial determination and reconsideration, and whatever additional relevant and material evidence the party or parties may present in writing for consideration by the presiding officer. Such documents shall be considered as all of the evidence in the case, and the decision, as provided, shall be based thereon. [4] FR 51587, Nov. 23, 1976]

Social Security Act, Section 205(g)

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of

the United States for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwith-

standing any change in the person occupying the office of Secretary or any vacancy in such office.

Social Security Act, Section 205(h)

(h) The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 24 of the Judicial Code of the United States to recover on any claim arising under this title.

Supreme Court, U
FILED
AUG 27 1980
MICHAEL RODAK, JR.,

No. 80-136

IN THE

Supreme Court of the United States

October Term, 1980

WANDA P. CHOCALLO, Administrative Law Judge,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF SIMON NASH, *AMICUS CURIAE*

SIMON NASH
Amicus Curiae, pro se
249 Norwood Avenue
Buffalo, New York 14222
(716) 885-4637

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
PHONE: (716) 344-2000

TABLE OF CONTENTS.

	Page
Statement of Interest of *Amicus Curiae*	1
The Facts	3
The Question	4
Summary of Argument	5
Argument	7
Conclusion	10

	Text	Reference
Appendix A: Statutes and Regulations:	11	
Social Security Act:		
Section 205(b)	11	1,2,3,5,8
Section 205(l)	11	1,5
Administrative Procedure Act:		
5 U.S.C. 551	12	5,8
5 U.S.C. 556	12	2,5,6,7,8
Regulations of Secretary:		
20 C.F.R. 404.921	13	6,9
20 C.F.R. 416.1429	13	6
20 C.F.R. 404.941	14	4,6,9
20 C.F.R. 416.1459	14	4,6
Appendix B: Original Delegation of Agency Authority to the Appeals Council: Extract from Federal Register, Vol, II, pp. 177A-567,8, September 11, 1946	15	7

TABLE OF AUTHORITIES.

Butz v. Economou, 438 U.S. 478 (1978) 10
Nash v. Califano, 613 F.2d 10 (CA-2-1980) 2,8,9

Statement of Interest of *Amicus Curiae*

I am an Administrative Law Judge (ALJ) appointed under 5 U.S.C. 3105 and I am assigned to the Buffalo, New York, field office of the Office of Hearings and Appeals of the Social Security Administration of the United States Department of Health and Human Services.

I am submitting this brief, as *amicus curiae,* under the provisions of Rule 36.

Under Section 205 (b) of the Social Security Act, 42 U.S.C. 405 (b), the Secretary of the Department is required to afford hearings to persons whose applications for benefits have been denied by the Social Security Administration. The proceedings are governed by the provisions of the Administrative Procedure Act (A.P.A.), 5 U.S.C. 550 *et seq.* Under Section 205 (l) of the Social Security Act, 42 U.S.C. 405 (1), the Secretary is "authorized to delegate to any member, officer, or employee of the Department . . . designated by him any of the powers conferred upon him by this section, . . ."

I am one of 650 ALJs, appointed under the A.P.A., to whom the Secretary has delegated his authority to hold Social Security hearings in 150 field offices throughout the United States. The Secretary has also purported to delegate that same authority—to hold hearings under Section 205 (b)—to his "Appeals Council," a 10-member appellate body, created by him, whose members are not ALJs, who only recently were required even to be lawyers, and who serve at the pleasure of the Secretary, or, in actuality, at the pleasure of his delegate, the Associate Commissioner of Social Security, who himself is Chairman of the Appeals Council, as well as administrative supervisor of all personnel of the Office of Hearings and Appeals, including the ALJs.

I brought an action in the United States District Court for the Western District of New York on May 30, 1978. I sought a declaratory judgment against the Secretary on six questions, one of which was the authority of the Secretary to delegate to the non-ALJ members of the Appeals Council the authority to "hold a hearing" or, as described in 5 U.S.C. 556 (b) to "preside at the taking of evidence." The District Court dismissed the amended complaint for lack of standing. The Court of Appeals for the Second Circuit reversed and remanded, but only on three of the six questions raised in the amended complaint. *Nash v. Califano*, 613 F. 2d 10 (1980). The Court of Appeals apparently affirmed the holding of the District Court that I had no standing to challenge the Secretary's delegation to members of the Appeals Council of his authority to hold hearings, 613 F. 2d 10, 17.

On August 4, 1980, the petitioner herein sent me a copy of the petition and suggested that I might wish to submit a brief under Rule 36, because the same question involved in her case before the Court of Appeals for the Third Circuit was also involved in my case before the Court of Appeals for the Second Circuit. The question is: May the Secretary lawfully delegate his "agency" power *to hold hearings* to any officers but ALJs? If he may not, then it would follow that the Appeals Council could not lawfully issue an order "removing *to itself*" (for hearing and initial decision) a case which had been duly assigned to an ALJ (for hearing and initial decision).

My primary interest in this case is to obtain an authoritative court ruling on the question of the legality of the delegation to non-ALJ members of the Appeals Council of the Secretary's power to hold hearings under Section 205 (b) of the Social Security Act. I maintain

that this is no mere academic question, but one of great importance, because, as things are now (and have been since 1940) the managerial functions and the judicial functions of the Office of Hearings and Appeals are combined in the Appeals Council—and, more particularly in the Associate Commissioner, who is also Chairman of the Council. If my argument is accepted, it might lead to a change, where, under the Secretary, as the "agency", the managerial, disciplinary, and supervisory branch—represented by the Associate Commissioner with his large bureaucracy of managers—would be *separated* from the judicial branch—represented by the ALJs as the "trial judges" and the Appeals Council as the "appellate judges", just as the prosecutorial functions have been separated from the judicial functions in the regulatory agencies since the passage of the A.P.A. in 1946.

In the case now before this Court, if it is found that the Appeals Council and its members do not have lawful authority to hold initial hearings under Section 205 (b), then the Council's orders, divesting the petitioner of jurisdiction *and* taking jurisdiction "to itself" (to hold the hearing and issue the initial decision) should be declared to be void. Under this view, this Court should issue the writ of certiorari prayed for by the petitioner. This brief, therefore, is in support of the petition.

The Facts

The petitioner was an ALJ, hearing and deciding Social Security cases in Philadelphia. In due course, the claim of William L. Macklin, Sr., was assigned to her for hearing and initial decision. While the case was pending before her, the Appeals Council issued two orders, pur-

porting to divest the petitioner of jurisdiction of the Macklin case and purporting to remove the case to itself. The Appeals Council issued the orders, pursuant to 20 C.F.R. 404.941 and 416.1459, which provide as follows: "The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer . . ." The petitioner refused to comply with the orders of the Appeals Council, insisting on her right and obligation to proceed with a hearing and to issue an initial decision. She accordingly refused to turn over the case files to the Appeals Council, as directed by the orders. The United States sued her, seeking declaratory, mandamus and injunctive relief, on behalf of the Secretary.

The District Court, Hon. John P. Fullam, granted the Government's motion for summary judgment, holding ". . . it is evident that the Appeals Council is empowered to divest the defendant of jurisdiction over the Macklin claim under 20 C.F.R. 404.941 and 416.1459, and to determine the matter itself . . ." The Court of Appeals for the Third Circuit affirmed, with a *per curiam* Judgment Order, ". . . for the reasons set forth in the district court opinion by the Honorable John P. Fullam." The petitioner now seeks a writ of certiorari from this Court.

The Question

Did the Appeals Council have lawful authority, under 20 C.F.R. 404.941 and 416.1459, to issue the orders of September 8, 1978, and December 11, 1978, which purported to divest the petitioner of jurisdiction to hold a hearing and issue an initial decision in the case of William L. Macklin, Sr.?

Summary of Argument

1. In cases under Section 205(b) of the Social Security Act, the "agency", within the meaning of 5 U.S.C. 551, is the Secretary of Health and Human Services; the "agency" is not the Appeals Council.

2. Under Section 205(l) of the Social Security Act, the Secretary may delegate to any subordinate or group of subordinates, including the Appeals Council, all of his authority under Section 205(b), except his authority to hold a hearing, or, in the words of the statute, "to preside at the taking of evidence".

3. The Secretary may not delegate hearing authority to the non-ALJ members of the Appeals Council, because, under the A.P.A., 5 U.S.C. 556(b), the agency itself must hold the hearing (*i.e.*, the Secretary, himself—or, herself, as it should be understood throughout this brief—) or, if the agency delegates the hearing authority, it must delegate it to one or more ALJs, appointed under the A.P.A.

4. Once the Secretary has made a valid delegation of jurisdiction to an ALJ, he, himself, as the "agency", has authority to divest the ALJ of jurisdiction, but only if he, himself, chooses to hold the hearing in person; even the Secretary, the agency, may not lawfully divest an ALJ of jurisdiction and then assign the case to another ALJ, since the A.P.A. requires cases to be assigned in rotation, and the action of the agency, divesting one ALJ and giving the case to another ALJ, would be arbitrary and capricious, as a violation of the agency's own procedures.

5. Since 5 U.S.C. 556(b) limits the Secretary's authority to delegate his hearing authority to ALJs only, the Secretary's Regulations, 20 C.F.R. 404.921 and 416.1429, purporting to delegate that authority to non-ALJ "members of the Appeals Council", are unlawful.

6. Since the non-ALJ members of the Appeals Council have no lawful authority to hold a hearing and issue an initial decision, the Secretary's Regulations, 20 C.F.R. 404.941 and 416.1459, purporting to authorize the Appeals Council "to remove to itself any request for hearing pending before a presiding officer", are also unlawful.

7. Since the Appeals Council had no lawful authority to issue the orders in question, the petitioner had no legal obligation to comply with them.

8. The District Court erred in holding that the Regulations were valid and that therefore the Appeals Council was "empowered to divest the defendant of jurisdiction . . . and to determine the matter itself".

9. Whether or not the *Macklin* claim was moot (the mootness of the claim was the purported reason for the action of the Appeals Council) was itself a question for initial determination by the petitioner; and the determination of that question was a matter within her judicial discretion.

10. The District Court erred in granting summary judgment for the respondent, the United States of America.

Argument

In 1940, six years before the passage of the A.P.A., the Social Security Board (the original "agency") established its "Office of Appeals Council" (See Appendix B). That "Office of Appeals Council" had two components: (1) A corps of 12 "referees", stationed in nine cities, to hold hearings on Social Security claims; and (2) an "Appeals Council", consisting of three members, with powers "to direct and supervise the referees ... and to review decisions." The Board further delegated "to the members of the Appeals Council and to the referees all necessary and appropriate powers to hold hearings and render decisions in accordance with such regulations as the Board shall adopt." The Board further delegated "to the members of the Appeals Council and the referees all necessary and appropriate powers to administer oaths and affirmations, issue subpoenas, examine witnesses and receive evidence." Thus, the Board specifically delegated complete hearing authority to the members of the Appeals Council, as well as to the referees, and, in addition, delegated to the Appeals Council appellate authority over the decisions of the referees.

The same delegation of authority has remained in effect until the present time. I submit, however, that the passage of the A.P.A., in 1946, rendered unlawful one part of the delegation to the members of the Appeals Council, namely, the delegation to hold hearings, since the "agency" (the Board, originally; the Federal Security Administrator, later; and the Secretary, today;) no longer had unrestricted power to delegate its hearing authority. The A.P.A. (5 U.S.C. 556(b)) limited the agency's authority to delegate, restricting such delegation of hearing authority to ALJs appointed under the A.P.A.

The Secretary, as the agency, has full power to delegate to the Appeals Council his authority to "direct" and "supervise" the ALJs, and to "review decisions" of the ALJs. But, after the passage of the A.P.A., the agency could no longer delegate hearing authority to the members of the Appeals Council, unless they were also ALJs, appointed under the A.P.A.

The delegation of hearing authority to non-ALJ members of the Appeals Council was first formally challenged in my case, *Nash v. Califano, supra.* On that point, the Government argued in the District Court that the Appeals Council was the "agency" under 5 U.S.C. 551. It is true that the Appeals Council, at first sight, "looks like" a typical multi-membered agency, like the I.C.C. or any other regulatory agency, with general appellate authority over a corps of ALJs. But Section 205(b) of the Social Security Act clearly establishes the Secretary as the agency, the "authority of the Government of the United States", 5 U.S.C. 551. In the Court of Appeals, the Government challenged my "standing" and also relied on an affidavit of Robert L. Trachtenberg that no member of the Appeals Council had ever, in fact, held a hearing. The Court of Appeals stated that I did not dispute the latter fact[1] and the Court indicated that

[1] I had no opportunity to dispute the affidavit of Mr. Trachtenberg, since it was submitted as an attachment to the Government's reply memorandum on its motion to dismiss my complaint. I submit that, ever since it was created, on March 1, 1940, the Appeals Council, its panels, and its individual members have "presided at the taking of evidence", within the meaning of 5 U.S.C. 556(b). Moreover, they have done so on a daily basis, both before and after the passage of the A.P.A. They have done so in this manner: When a claimant appeals from a decision of an ALJ, issued after a hearing, the Appeals Council and its members, as a matter of course, receive into evidence

(Footnote continued on following page)

the particular claim lacked merit, 613 F.2d 10, 17. I interpret the Court's decision as meaning that if I could show harm to me because of such delegation, or if the members of the Appeals Council were actually exercising the hearing authority specifically conferred on them (See Appendix A, 20 C.F.R. 404.921), I would have standing to challenge the delegation. At any rate, although the holding on this point may not be entirely clear, the implication is that the delegation might be held to be unlawful, if the point was raised in a proper case. In the instant case, however, the Court of Appeals for the Third Circuit has (by implication) upheld the delegation of hearing authority to the non-ALJ members of the Appeals Council, since it has specifically upheld 20 C.F.R. 404.941, which permits the Appeals Council to remove cases to itself. I have indicated above why I think the question is of importance. I also suggest that there is a conflict between the decision of the Second Circuit in my case and the decision of the Third Circuit in the petitioner's case, and that this Court should resolve the conflict.

I stated above that my primary interest in this case was to obtain a decision on the issue of the delegation of hearing authority to non-ALJ members of the Appeals Council. My secondary interest is to obtain a decision which will protect ALJs from arbitrary action by their employing agencies. In this case, the Appeals Council ostensibly took the case away from the petitioner,

---

(Footnote continued from preceding page)

additional documents (affidavits, doctors' reports, hospital reports) and, on the basis thereof, reverse the decision of the ALJ. The Council and its members will also hear sworn testimony on requests for review, a procedure which I described in my complaint as supplemental hearings.

because the case was moot. But I submit that, whether the case was moot or not, was up to the petitioner to decide in the first instance, as the duly appointed ALJ. If she made a mistake in her decision, no great harm would have been done, since the admittedly proper function of the Appeals Council is to correct the mistakes of the ALJs. The petitioner refused to obey an order, which she thought had been issued without legal authority. As I have argued in this brief, I think she was right. But even if she had been wrong, her decision would have been a "judicial" decision, within the scope of her authority under the A.P.A. She has since been discharged from her position for her failure to obey two other orders of the Appeals Council, similar in all respects to the orders involved in the instant case. I suggest that, as an ALJ, she should be entitled to "absolute immunity" from adverse action by the agency, due to a mistake she may have made about the extent of her jurisdiction. In *Butz v. Economou*, 438 U.S. 478, this Court protected the ALJ from retaliation by a party to a proceeding before him. I suggest that it is equally appropriate in this case for the Court to protect the petitioner from the harsh penalty which she has incurred for asserting her right—as an ALJ—to refuse to obey orders, which, in the exercise of her judicial discretion, she believed to be unlawful.

Conclusion

Because the question is an important one, on which two Circuit Courts of Appeals have expressed differing views, this Court should issue the writ prayed for and decide the case on the merits.

Respectfully submitted,

SIMON NASH,
Amicus Curiae, pro se.

APPENDIX A

Statutes and Regulations

Section 205(b) of the Social Security Act, 42 U.S.C. 405(b)

(b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this title. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

Section 205(l) of the Social Security Act, 42 U.S.C. 405(l)

(l) The Secretary is authorized to delegate to any member, officer, or employee of the Department of Health, Education and Welfare designated by him any of

the powers conferred upon him by this section, and is authorized to be represented by his own attorneys in court in any case or proceeding arising under the provisions of subsection (e).

Administrative Procedure Act, Title 5, United States Code

§551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

. . .

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title . . . .

Regulations of the Secretary, Authorizing non-ALJ Members of the Appeals Council to Preside at Hearings

20 Code of Federal Regulations

20 CFR 404.921 Presiding Officer

The hearing provided for in this Subpart J, except as otherwise provided herein, shall be conducted by a duly appointed presiding officer. Such presiding officer shall be designated by the Director of the Bureau of Hearings and Appeals or his delegate. The Director or his delegate may also designate a member of the Appeals Council to conduct a hearing, in which case the provisions of this Subpart J governing the conduct of a hearing shall be applicable thereto.

20 CFR 416.1429 Presiding Officer

The hearing provided for in this Subpart N shall, except as herein provided, be conducted by:

(a) An administrative law judge appointed pursuant to 5 U.S.C. 3105; or

(b) A hearing examiner, SSI (hearing examiner, Supplemental Security Income), appointed pursuant to the authority of the Secretary as provided in section 1631(d)(2) of the Act.

Such presiding officer shall be designated by the Director of the Bureau of Hearings and Appeals or his delegate. Where a consolidated hearing is conducted as provided in §416.1436, the presiding officer designated shall be an administrative law judge. The Director may also designate a member or members of the Appeals Council to conduct a hearing, in which case the provisions of this Subpart N governing the conduct of a hearing by a presiding officer shall be applicable thereto.

Regulations of the Secretary, Authorizing the Appeals Council to remove pending cases to itself

20 C.F.R. 404.941 Removal of hearing to Appeals Council

The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer. The hearing on any matter so removed to the Appeals Council shall be conducted in accordance with the requirements of §§404.924 to 404.938, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

20 C.F.R. 416.1459 Removal of hearing to Appeals Council

The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer. The hearing on any request so removed to the Appeals Council shall be conducted in accordance with the requirements of §§416.1433 to 416.1446, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

APPENDIX B

Original Delegation of Authority to the Appeals Council

Extract from Federal Register, September 11, 1946

SOCIAL SECURITY ADMINISTRATION
[20 CFR, Ch. III]
Part 421—Statement of Organization

Subpart B—Office Of The Appeals Council

§421.6 *Organization of the office of the Appeals Council*—(a) *Authority and functions.* On March 1, 1940, the Social Security Board established the Office of Appeals Council and delegated powers to the members of this office by the following formal action:

In order to afford hearings as may be provided by regulations which the Board shall adopt with respect to benefit payments under Title II and with respect to the revision of wage records maintained by the Board, the Social Security Board, pursuant to authority conferred on it by the Social Security Act and the Social Security Act Amendments of 1939:

(a) Hereby establishes an Appeals Council, consisting of three members, one of whom shall act as Chairman of the Council and as the administrative officer;

(b) Hereby delegates to the Appeals Council all necessary and appropriate powers to direct and supervise the referees appointed by the Board and to review decisions in accordance with such regulations as the Board shall adopt;

(c) Hereby delegates to the members of the Appeals Council and to the referees all necessary and appropriate powers to hold hearings and render decisions in accordance with such regulations as the Board shall adopt;

(d) Hereby delegates to the members of the Appeals Council and the referees all necessary and appropriate powers to administer oaths and affirmations, issue subpoenas, examine witnesses and receive evidence.

On July 16, 1946, the functions of the Social Security Board were transferred to the Administrator of the Federal Security Agency. On July 16, 1946, the Administrator of the Federal Security Agency made the following delegation of authority to the Office of the Appeals Council:

d. All duties, powers, and functions relating to the holding of hearings, the rendition of decisions, and the review of decisions in connection with administrative appeals from determinations made under title II of the Social Security Act, as amended, and affecting benefits, lump sums or wage records, including the administration of oaths and affirmations, the issuance of subpoenas, the examination of witnesses and the receipt of evidence, and all duties, powers, and functions relating to judicial review of decisions made upon appeal, which were transferred from the Social Security Board by Reorganization Plan No. 2 of 1946 are assigned to the Office of Appeals Council in the Social Security Administration and shall be exercised by the Ap-

peals Council, its members and referees in accordance with applicable rules as from time to time amended by the Commissioner with the approval of the Administrator.

(b) Established offices. The Council consists of the Chairman and two members. There is also a staff of professional clerical and stenographic employees. The Chairman is responsible for the administration of the office. It is the function of the three members of the Appeals Council in Washington to pass on requests for review of decisions rendered by referees; render decisions where the request has been granted; review decisions of referees on its own motion; render decisions on cases certified by the referees and prepare and certify the record of the case where a civil action has been instituted to review a decision of the office. It is the function of the referees, as designated by the Chairman of the Appeals Council, to hold hearings and render decisions in cases where a request for hearing has been filed. The referee may, if he deems it advisable, certify the case to the Appeals Council for decision. A reporter is assigned to each referee.

The central office of the Office of Appeals Council is located in the Federal Security Agency Building, 4th and Independence Avenue. Washington, D. C. The field staff consists of 12 referees located at the following addresses:

1 Referee—120 Boylston Street, Boston 16, Mass.

3 Referees—11 West Forty-second Street, New York 18, N. Y.

1 Referee—1523 L. Street NW., Washington 25, D. C.

Appendix B—Original Delegation of Authority to the Appeals Council.

1 Referee—Euclid Avenue and East Ninth Street, Cleveland 14, Ohio.

1 Referee—Midland Bank Building, Fourth Floor, Minneapolis 1, Minn.

1 Referee—441 West Peachtree Street, Atlanta 5, Ga.

1 Referee—1006 Grand Avenue, Kansas City 6, Mo.

1 Referee—North Presa and East Houston Street, San Antonio 5, Tex.

2 Referees—785 Market Street, San Franciso 3, Calif.

Pursuant to section 3 of the Administrative Procedure Act (Public Law 404, 79th Cong.) the foregoing statements are hereby made this 27th day of August 1946.

[Seal] A. J. ALTMEYER,
Commissioner for Social Security.

Approved: August 28, 1946.

Maurice Collins,
Acting Federal Security Administrator.